

U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, VA 23606-1904

(757) 873-3099
(757) 873-3634 (FAX)



Issue date: 26Jul2002

Case No. 2002-SWD-0002

In the Matter of

BARDEN CANNAMELA,
Complainant

v.

STATE OF GEORGIA,
DEPARTMENT OF NATURAL RESOURCES,
ENVIRONMENTAL PROTECTION DIVISION,
Respondent

Appearances:

Curtis G. Shoemaker, Esq., for Complainant

Annette M. Cowart, Esq.

Assistant Attorney General, State of Georgia, for Respondent

Before:

RICHARD E. HUDDLESTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The above-styled action arises pursuant to a complaint filed with the Secretary of Labor, by Mr. Barden Cannamela on October 3, 2001, versus the State of Georgia Department of Natural Resources. The complaint asserts that Complainant was subjected to adverse personnel actions in retaliation for matters raised by him regarding "waste and misuse of funds in certain environmental programs with which he is in contact because of his employment." The Complaint was investigated by the Occupational Safety and Health Administration, U.S. Department of Labor, (OSHA) pursuant to § 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act 42 U.S.C. § 9610 and § 7001(a) of the Solid Waste Disposal Act, 42 U.S.C. 6971, and regulations at 29 C.F.R. Part 24. The Regional Administrator of OSHA issued a notice of the results of the investigation on April 5, 2002, finding that the complaint had no merit. The notice further advised the Complainant of his right to appeal the findings to the Chief Administrative Law Judge.

This matter was forwarded to the Office of Administrative Law Judges on April 5, 2002. On April 12, 2002, a request for hearing was filed by Counsel for Complainant, by facsimile transmission to the Chief Administrative Law Judge. On April 17, 2002, the case was assigned

to the undersigned Administrative Law Judge for formal hearing pursuant to 29 C.F.R. § 24.6. A notice of hearing was issued setting this matter for trial commencing on July 9, 2002, in Atlanta, Georgia.

However, On May 10, 2002, a telephone conference was conducted with Counsel for Complainant, Barden Cannamela, and Counsel for Respondent, State of Georgia, to discuss whether Respondent would be asserting immunity pursuant to the Eleventh Amendment to the U.S. Constitution. During the conference Respondent advised that it would be filing a motion to dismiss on Eleventh Amendment grounds. The parties were advised that the U.S. Supreme Court had recently granted *certiorari* in the matter of *Federal Maritime Commission v. South Carolina Ports Authority et al.*, Docket No. 01-146. The issue before the Court was whether the Eleventh Amendment applies to a private action filed against the State of South Carolina, but tried before an Administrative Law Judge of the Federal Maritime Commission. At that time, both parties agreed that this matter should be held in abeyance pending the Court's decision. Therefore, the hearing was canceled.

On May 28, 2002, the Court issued its opinion in *Federal Maritime Commission v. South Carolina Ports Authority*, 122 S.Ct. 1864 (2002),¹ The Court held that state sovereign immunity under the Eleventh Amendment to the U.S. CONSTITUTION bars the Federal Maritime Commission from adjudicating a private party's complaint against a nonconsenting State.

On June 18, 2002, the Respondent, a division of the State of Georgia, filed a motion to dismiss this action on the grounds that the State of Georgia is entitled to sovereign immunity from lawsuits by private individuals, citing Court's decision in *FMC v. South Carolina*.

On July 22, 2002, the Complainant filed an answer to the motion to dismiss, asserting that the instant proceedings do not involve an adjudication. Instead, Complainant argues that the Administrative Law Judge "is simply performing an investigative function which results in a report to the Secretary of Labor." Thus, Complainant argues that *FMC v. South Carolina* does not apply to these proceedings.

At the outset, I note that it is not disputed that the Complainant in this case is a private citizen and that the Respondent is an agency of the State of Georgia. Further, by filing its motion to dismiss, the State of Georgia has clearly indicated that it does not consent to being sued in this forum. Further, as the OSHA investigation found no merit to the complaint, the U.S. Department of Labor has not elected to prosecute this matter. Therefore, there is no dispute that this is a purely private cause of action filed by an individual against the State of Georgia.

Upon consideration of the motion and response, I find that the Complainant's argument has no merit. The referral of this case to the Office of Administrative Law Judges was made for an adjudicative hearing pursuant to 5 U.S.C. §§ 554 and 29 C.F.R. § 24.6. The investigation in this case was conducted by the OSHA pursuant to 29 C.F.R. § 24.4. Although the decision issued in this matter is a recommended decision, the regulation provides that it becomes the final

¹ Hereinafter referred to as *FMC v. South Carolina*.

order of the Secretary of Labor unless a petition for review is timely filed with the Administrative Review Board. 29 C.F.R. § 24.7(d). Moreover, administrative law judges appointed pursuant to 5 U.S.C. §§ 3105 are prohibited from performing duties inconsistent with their duties and responsibilities as administrative law judges. Administrative Law Judges adjudicate cases and are not investigators. This stage of this proceeding is the functional equivalent of the trial of a civil action before the U.S. District Court. Therefore, the argument that this is an investigation rather than an adjudication is rejected.

As this proceeding involves an adjudication of a claim by a private individual against the State of Georgia, the Eleventh Amendment bar of sovereign immunity applies. The Supreme Court's decision in *FMC v. South Carolina* clearly holds that sovereign immunity applies to proceedings before Administrative Law Judges appointed pursuant to the exercise of Congress' powers under Article I of the Constitution, just as it applies to proceedings before Article III Judges. The Court states that, "[A]nd it would quite strange were Congress prohibited from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, but permitted to use those same powers to create court-like administrative tribunals where sovereign immunity would not apply." Pp. 14.16.

Adjudications before Administrative Law Judges of the U.S. Department of Labor, like those of the Federal Maritime Commission, are similar to federal civil litigation before the U.S. District Court. The rules governing pleadings in both types of proceedings are quite similar; discovery in ALJ adjudications largely mirrors that in federal civil litigation; the role of the ALJ is similar to that of an Article III judge; and, in situations not covered by Department of Labor regulations, the Rules of Practice and Procedure (20 C.F.R. Part 18) provide that the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation. 29 C.F.R. § 18.1.

Accordingly, I find that the motion to dismiss this action with prejudice on the grounds of sovereign immunity must be Granted, and it is:

So Ordered.

A

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§§§ 24.7(d) and 24.8.